Rakyat Merchant Bankers Bhd v Abdul Rahim Aki & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-370 OF 1995
KAMALANATHAN RATNAM JC
7 JANUARY 1997

Civil Procedure *— Locus standi — Want of authority — Plaintiff brought action against defendants for breach of loan agreement — Plaintiff declared insolvent at the time writ was filed — Bank Negara assumes control of the property, business and affairs of the plaintiff pursuant to order made under the Banking and Financial Institutions Act 1989 — Whether plaintiff has locus standi to institute action against defendant without express authorization from Bank Negara — Banking and Financial Institutions (Rakyat Merchant Bankers Bhd) (Assumption of Control) Order 1994*

The plaintiff, by a written agreement, granted the first defendant a term loan facility of RM3m. By another agreement, the second and third defendants guaranteed the repayment of the loan facility. In breach of the agreement, the first defendant defaulted in making payments. The plaintiff terminated the agreement and issued a writ through their solicitors on 12 July 1995 against the defendants claiming the repayment of the loan facility. At the time the writ was filed, the plaintiff was already declared insolvent. An order was made under s 73(2) of the Banking and Financial Institutions Act 1989 ('the Act') for Bank Negara to assume control of the property, business and affairs of the plaintiff. The second defendant took out a summon to strike out the writ and statement of claim on the grounds, inter alia, that: (i) the plaintiff did not have legal right or locus standi to file proceedings against the defendants; and (ii) the plaintiff's solicitors had no proper legally constituted authority to act for the plaintiff. This application was allowed by the senior assistant registrar. The plaintiff appealed.

Held, dismissing the appeal:

(1) The writ and statement of claim filed by the plaintiff's solicitors made no mention that they were instituted with the authority of Bank Negara who had assumed control of the affairs of the plaintiff under the Banking and Financial Institutions (Rakyat Merchant Bankers Bhd) (Assumption of Control) Order 1994. Without express authorization from Bank Negara, the plaintiff would not have the legal right or locus standi on its own to institute action against the defendant or give instruction to its solicitor to act (see p 206G–I); *Danish Mercantile Co Ltd & Ors v Beaumont & Anor* [1951] 1 All ER 925 followed.

(2) The plaintiff's solicitors could not rely on the instruction given by Tay Bin Chat, who had been given a power of attorney by Bank Negara, as authority to act for the plaintiff. The power of attorney was exerciseable only under given conditions as stipulated in the power of attorney itself and the plaintiff had not shown that the said conditions had occurred (see p 207F–G).

Obiter

Whilst it could be presumed that the grant of the power of attorney by Bank Negara to Tay Bin Chat was proper, pursuant to s 114(e) of the Evidence Act 1950, this section could not apply to the acts of a donee of a power of attorney; otherwise, any act of a donee of a power of attorney could be deemed regular and no challenge could be made with regard to the commission or omission of an act of a donee of a power of attorney. This is not what the law intends (see pp 207H–208A).]

[Bahasa Malaysia summary

Melalui suatu perjanjian bertulis, plaintif memberikan kemudahan pinjaman sebanyak RM3 juta kepada defendan pertama. Melalui suatu perjanjian lain, defendan kedua dan ketiga telah menggerenti pembayaran balik kemudahan pinjaman tersebut. Defendan pertama telah mungkir perjanjian apabila beliau gagal membuat pembayaran. Plaintif telah menamatkan perjanjian dan mengeluarkan writ melalui peguamcara mereka pada 12 Julai 1995 terhadap defendan-defendan menuntut bayaran balik kemudahan pinjaman tersebut. Pada masa writ itu difailkan, plaintif telah pun diisytiharkan tak solven. Satu perintah telah dikeluarkan di bawah s 73(2) Akta Bank and Institusi-Institusi Kewangan 1989 ('Akta tersebut') untuk Bank Negara mengambil alih kawalan ke atas harta, perniagaan dan hal ehwal plaintif. Defendan kedua telah mengeluarkan saman untuk membatalkan writ dan pernyataan tuntutan plaintif atas alasan, antara lain, bahawa: (i) plaintif tidak mempunyai hak atau locus standi untuk memfailkan prosiding ke atas defendan-defendan; dan (ii) peguamcara plaintif tidak mempunyai kuasa yang sah di sisi undang-undang untuk bertindak bagi pihak plaintif. Permohonan ini telah dibenarkan oleh penolong kanan pendaftar. Plaintif membuat rayuan.

Diputuskan, menolak rayuan:

(i) Writ dan pernyataan tuntutan yang difailkan oleh peguamcara plaintif tidak menyebutkan bahawa ia telah dilakukan dengan kebenaran Bank Negara yang telah mengambil alih kawalan ke atas plaintif di bawah Perintah Bank and Institusi-Institusi Kewangan (Rakyat Merchant Bankers Bhd) (Pengambil alih Kawalan) 1994. Tanpa kebenaran nyata daripada Bank Negara, plaintif tidak mempunyai hak atau locus standi tersendiri untuk mengambil tindakan ke atas defendan atau memberi arahan kepada peguamcara untuk bertindak (lihat ms 206G–I); *Danish Mercantile Co Ltd & Ors v Beaumont & Anor* [1951] 1 All ER 925 diikut.

(ii) Peguamcara plaintif tidak boleh bergantung kepada arahan yang diberi oleh Tay Bin Chat yang telah diberi satu surat kuasa wakil oleh Bank Negara sebagai kebenaran untuk bertindak bagi pihak plaintif. Surat kuasa wakil tersebut hanya boleh digunakan atas

syarat-syarat yang tertentu yang disebutkan di dalam surat kuasa wakil tersebut dan plaintif tidak menunjukkan bahawa syarat-syarat tersebut telah tercapai (lihat ms 207F–G).

Obiter

Walaupun boleh dianggap bahawa pemberian surat kuasa wakil oleh Bank Negara kepada Tay Bin Chat adalah wajar, mengikut s 114(e) Akta Keterangan 1950, seksyen ini tidak terpakai kepada tindak tanduk penerima kuasa di bawah surat kuasa wakil; jika tidak, apa-apa tindak tanduk penerima kuasa di bawah surat kuasa wakil boleh dianggap di bawah aturan dan tiada cabaran boleh dibuat berkaitan dengan kelakuan atau peninggalan sesuatu tindakan oleh penerima kuasa di bawah surat kuasa wakil. Undang-undang tidak bertujuan demikian (lihat ms 207H–208A).]

Notes

For cases on locus standi, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2272–2290.

Case referred to

Danish Mercantile Co Ltd & Ors v Beaumont & Anor [1951] 1 All ER 925 (folld)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 73(2), (5), 76(1), (2)
Banking and Financial Institutions (Rakyat Merchant Bankers Bhd) (Assumption of Control) Order 1994 O 2
Evidence Act 1950 s 114(e)
Rules of the High Court 1980 O 18 r 7(1)

L Rasaratnam and *KA Gan* (*Lee Hishammudin*) for the plaintiff.
Michael Tan (*Tan Lip Yip & Co*) for the second and third defendants.

Kamalanathan Ratnam JC: By a written agreement entered into between the plaintiff bankers and the first defendant dated 14 June 1993 ('the agreement'), the plaintiff granted a term loan facility in the maximum aggregate principal sum of RM3m. By another written agreement also dated 14 June 1993 ('the guarantee') between the plaintiff and the second and third defendants, the second and third defendants agreed to jointly and severally guarantee as principal debtors the payment of any monies payable by the first defendant to the plaintiff under the agreement. Pursuant to the agreement, the plaintiff allowed the first defendant to drawdown RM3m. In breach of the agreement, the first defendant has defaulted in making any of the repayments of two semi-annual instalments and the interest charged therein. The plaintiff then by a letter dated 12 June 1995 terminated the agreement and demanded payment of all monies owing under the loan facility. The plaintiff claimed from the first defendant a sum of RM3,205,460.68 as at 30 June 1995 together with interest at the

rate of 13%pa on daily basis on the sum of RM3,205,460.68 from 1 July 1995 to date of full settlement. It was, inter alia, a term of the guarantee that in the event that the first defendant defaults in any of the terms and conditions of the agreement, the plaintiff is entitled to demand the full repayment from the second and third defendants, of any monies due and owing from the first defendant to the plaintiff under the agreement. By a letter dated 14 June 1995, the plaintiff demanded from the the second and third defendants the sums due from the first defendant.

The second defendant took out a summons to strike out the writ and statement of claim on the grounds that: (i) the plaintiff as named in the writ did not have a legal right or locus standi to file proceedings against the defendants; (ii) the firm of Lee Hishammuddin had no proper legally constituted authority to act for the plaintiff; (iii) the plaintiff had no locus standi to take any action against the defendants; and (iv) the act of filing proceedings by the plaintiff amounted to an abuse of the process of the court.

This application was heard by the learned senior assistant registrar ('the SAR') and, on 22 April 1996, he allowed the application. This appeal by the plaintiff (encl 21) is against that decision.

Before I could hear encl 21, the plaintiff took out a summons (encl 25) seeking leave for an affidavit affirmed on 4 May 1996 (encl 24) by one Gan Khong Aik and filed, to be admitted in evidence at the hearing of encl 21.

This application was strenuously opposed by the second defendant. On 22 May 1996, after hearing arguments, I exercised my discretion and admitted encl 24 in evidence. I awarded costs of the application to the second defendant in any event to be agreed to or taxed and to be paid within seven days of the presentation of the allocator or letter of agreement on the costs. There is no appeal against this decision.

On this appeal, Mr L Rasaratnam for the plaintiff submitted that since he did not know on which of the four grounds the SAR had allowed the application, he would submit on all four. He prefaced his submission by stating that the action was filed on 12 July 1995 by Rakyat Merchant Bankers Bhd. He pointed out that by an agreement dated 15 June 1995, the plaintiff agreed to transfer to BSN Merchant Bankers Bhd the assets and liabilities of the plaintiff ('the transfer agreement') and on 22 July 1995 a vesting order was made by the Kuala Lumpur High Court giving effect to the transfer agreement. It was, inter alia, ordered that all legal proceedings in relation to the assets and liabilities as defined in the vesting order which are pending and in or to which the plaintiff is a party may be continued as if the said BSN Merchant Bankers Bhd had been a party thereto instead of the plaintiff, from the transfer date.

The plaintiff contended that on the date the writ was filed, it was Rakyat Merchant Bankers Bhd who had the right to file this action and that those rights arose from the agreement. This action was being continued by BSN Merchant Bankers Bhd pursuant to the vesting order dated 22 July 1995. Since I had admitted encl 24, the plaintiff referred me to exh GKA-1 which was a letter dated 27 April 1996 from Tay Bin Chat, the

attorney of the plaintiff, to their solicitors Messrs Lee Hishammuddin confirming giving authority on or before 6 February 1995 to the said solicitors, to commence these proceedings against the defendants. In the circumstances, it was submitted that the allegation of lack of authority on the part of the solicitors to act was rendered innocuous.

In reply, Mr Tan for the defendants submitted that when the writ was issued against the defendants on 12 July 1995, Rakyat Merchant Bankers Bhd was insolvent which necessitated Bank Negara to recommend to the Minister of Finance to obtain an order for Bank Negara to assume control of the entire property, business and affairs of Rakyat Merchant Bankers Bhd under s 73(2) of the Banking and Financial Institutions Act 1989 ('the Act'). It was urged upon me that since news of the insolvency of Rakyat Merchant Bankers Bhd and that Bank Negara had taken over control was published in all the major newspapers, therefore, the order made by the Minister should be within the knowledge of the Rakyat Merchant Bankers Bhd and its solicitors. It was pointed out to me that the writ and statement of claim filed by Lee Hishammuddin on behalf of Rakyat Merchant Bankers Bhd made no mention that the same was instituted with the authority of Bank Negara. Relying on O 18 r 7(1) of the Rules of the High Court 1980 ('the RHC'), the second defendant argued that the omission of so fundamental a material fact had rendered the writ and statement of claim defective. It was contended by the second defendant that the affidavits filed by the plaintiff in response to the second defendant's challenge as to lack of authority on the part of the plaintiff and/or their solicitors to institute the action did not mention from whom they received the authority to institute the action.

Referring to the power of attorney given to Tay Bin Chat annexed as an exhibit to encl 24, the second defendant pointed out that it was a restrictive power of attorney and contained conditions to be fulfilled before Tay Bin Chat could exercise the powers.

The court's findings

The plaintiff issued this writ through its solicitors, Lee Hishammuddin, on 12 July 1995 against the defendants. At the time the writ was issued, it was a fact that the plaintiff was insolvent. Section 73(2) of the Act reads as follows:

> (2) Where any of the circumstances set out in paragraphs (a) and (b) of subsection (1) exist in respect of a licensed local institution, the Bank may, instead of exercising any of its powers under paragraphs (A), (B), (C), (D) or (E) of subsection (1), recommend to the Minister to provide, and the Minister may on such recommendation accordingly provide, by order published in the *Gazette* —
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> (a) for the Bank to assume control of the whole of the property, business and affairs of the licensed institution, and carry on the whole of its business and affairs, or to assume control of such part of its property, business and affairs, and carry on such part of its business and affairs, as may be set out in the order, or for the Bank to appoint any person to do so on behalf of the Bank, and for the

costs and expenses of the Bank, or the remuneration of the person so appointed, as the case may be, to be payable out of the funds and properties of the institution as a first charge thereon;

(b) whether or not an order has been made under paragraph (a), authorize an application to be made by the Bank to the High Court to appoint a receiver or manager to manage the whole of the business, affairs and property of the licensed institution, or such part thereof as may be set out in the order, and for all such incidental, ancillary or consequential orders or directions of the High Court in relation to such appointment as may, in the opinion of the Bank, be necessary or expedient; or

(c) where the institution is a licensed local institution, whether or not an order has been made under paragraph (a) or (b), to authorize the Bank to present a petition to the High Court for the winding up of the institution.

Pursuant to this section, an order cited as The Banking and Financial Institutions (Rakyat Merchant Bankers Bhd) (Assumption of Control) Order 1994 was made on 2 March 1994 and published in the gazette and came into force on 2 March 1994 ('the 1994 Order'). Pursuant to O 2 of the 1994 order, 'the Bank' is authorized to assume control of the whole of the property, business and affairs of the licensed merchant bank and to carry on the whole of its business and affairs. 'The Bank' as defined in the Act means the Central Bank of Malaysia established by the Ordinance. Under s 76(1) of the Act where control of a licensed institution has been assumed in pursuant of an order under s 73(2)(a) of the Act, the institution and its directors and officers shall submit its property, business and affairs to such control. Under s 76(2) of the Act where control of a licensed institution has been assumed in pursuance of an order under s 73(2)(a), the Bank or the appointed person, as the case may be, shall remain in control of the property, business and affairs of the licensed institution concerned, and carry on the business and affairs of that institution in the name and on behalf of that institution as provided for in the said order, until such time as the said order is revoked under s 73(5). I accept the submission of Mr Tan that the plaintiff has not proved satisfactorily that the suit had been instituted with proper authority. I find that the writ and statement of claim filed by the plaintiff's solicitors make no mention that the said writ and statement of claim were instituted with the authority of Bank Negara who had assumed control of the affairs of Rakyat Merchant Bankers Bhd under the 1994 Order. Because of the insolvency of the plaintiff and the 1994 Order authorizing Bank Negara to assume full control of its affairs, all powers and functions of the Board of Directors of Rakyat Merchant Bankers Bhd, had been suspended and the said Rakyat Merchant Bankers Bhd, without express authorization from Bank Negara, would not have any legal right or locus standi on its own to institute action against the defendants and/or give instructions to Lee Hishammuddin to act. In *Danish Mercantile Co Ltd & Ors v Beaumont & Anor* [1951] 1 All ER 925, the Court of Appeal held that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at

his peril, and, so long as the matter rests there, the action is not properly constituted. In that sense, it is a nullity and can be stayed at any time, provided the aggrieved defendant does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to instruct him to continue with them. I find that in the present case there has been no attempt to even ratify the act of the solicitors.

I now have to consider the power of attorney given to Tay Bin Chat by Bank Negara. I reproduce for clarity the relevant portion of the power of attorney germane to this case:

> Now therefore, Bank Negara Malaysia hereby constitutes and appoints Tay Bin Chat @ Tay Ming Chat (NRIC No: 0128933), with full power of substitution, as its true and lawful attorney for and in the name and on behalf of Rakyat Merchant Bankers Bhd to do the following acts and things:
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> (1) To exercise the powers, perform the functions and discharge the duties set out in this power of attorney in relation to the following acts and things only on the occurrence of one of the following events:
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> (a) when a chief executive officer of Rakyat Merchant Bankers Bhd appointed or to be appointed by Bank Negara has not yet assumed his office;
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> (b) when the chief executive officer has assumed office but is absent for any reason from office; or
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> (c) on the directions of the chief executive officer.

It has not been shown as to whether any of the three conditions stipulated for the exercise of the power had occurred when the said Tay Bin Chat gave instructions to Lee Hishammuddin some time on or before 6 February 1995 as stated by him in his letter dated 27 April 1996 to Lee Hishammuddin (exh GKA-1). In any event, in none of the affidavits averred to by the plaintiff is there any reference to the power of attorney or to the instructions given by the said Tay Bin Chat. The submission of the plaintiff that the second defendant ought to have raised these objections and the non-compliance with any of the three conditions in an affidavit to enable the plaintiff to reply, is totally unacceptable. It is not the duty of the defence to patch up the evidence of the plaintiff. The onus is always upon the plaintiff to prove its case.

Since neither party had considered the question of s 114(e) of the Evidence Act 1950, it is not the duty of the court to raise it. In any case, even if this section was relied upon by the plaintiff, I am of the view that it cannot assist the plaintiff. There are any one of three conditions to be considered before the power of attorney could have effect. This court should not be over-burdened with the task of having to consider each of the three conditions and then to presume that the official act of the donee of the power attorney was regularly performed. Whilst I can and ought to presume that the grant of the power of attorney by Bank Negara to Tay Bin Chat was proper, pursuant to s 114(e) of the Evidence Act 1950, this section cannot apply to the acts of a donee of a power of attorney; otherwise, any act of a donee of a power of attorney could be deemed

regular and no challenge can be made with regard to the commission or omission of an act of a donee of a power of attorney. This is not what the law intends. A

Having considered all the authorities submitted by both counsel, I dismissed this appeal with costs.

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Appeal dismissed.

Reported by Charles Jaikumar

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